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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 93-135
)	
THE PETROLEUM V. NASBY)	
CORPORATION)	File No. BRH-890601VB
)	
For Renewal of License)	
of Station WSWR (FM),)	
Shelby, Ohio)	
)	
THE PETROLEUM V. NASBY)	
CORPORATION)	File Nos. BTCH-921019HX
)	and BTCH-921019HY
For Transfer of Control)	
of Station WSWR (FM),)	
Shelby, Ohio)	

To: Administrative Law Judge
Edward Luton

MASS MEDIA BUREAU'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Summary

1. The Commission specified an issue to determine the effect upon Nasby's qualifications of numerous felony convictions of Thomas L. Root. At the time of the misconduct Root owned between 15.6% and 44% of Nasby and he was a director and corporate secretary. He was an active owner.

2. Because of the willfulness, frequency, currency and seriousness of Root's misconduct, there is no doubt that Nasby lacks the character qualifications to remain a Commission licensee. It is significant that Root's wrongdoing included the forging of an order of a Commission Administrative Law Judge and the submission to the Commission of a counterfeit Federal Aviation Administration "No Hazard" determination.

3. Even if it were not concluded that Nasby lacks the character qualifications to remain a Commission licensee because of Root's convictions, Nasby would have to be disqualified for effecting an unauthorized transfer of control. The evidence belies the suggestion that the failure to seek prior Commission approval for the transfer of control was inadvertent.

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**MASS MEDIA BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Preliminary Statement

1. By Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 8 FCC Rcd 4035 (1993), the Commission designated the above-captioned applications for hearing in a consolidated proceeding upon the following issues:

1. To determine the effect of Thomas L. Root's federal and state convictions on the basic qualifications of The Petroleum V. Nasby Corporation.

2. To determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Thomas L. Root and Kathy G. Root engaged in the unauthorized transfer of control of The Petroleum V. Nasby Corporation.

3. To determine, in light of the evidence adduced pursuant to the above issues, whether grant of the renewal application of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

4. To determine, in light of the foregoing, whether approval of the pending applications seeking to transfer control of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

The Petroleum V. Nasby Corporation ("Nasby") has the burden of proof with respect to all issues.

2. A hearing session was held on December 14, 1993, whereupon the record was closed. Tr. 97, 98. The Mass Media Bureau hereby submits its Proposed Findings of Fact and Conclusions of Law.

Proposed Findings of Fact

Convictions Issue

3. The Commission specified issue 1 to determine the effect upon Nasby's character qualifications of numerous felony convictions of Thomas L. Root. Root was a shareholder, director and officer of Nasby at the time of the misconduct which culminated in his convictions.

4. As of May 29, 1989, Thomas L. Root owned 24% of Nasby's stock individually and another 10% as custodian for his minor children. Joint Exhibit 1: Stipulations of Fact (hereinafter "Stip.") at p. 3. As a result of a number of transactions during the week of May 29, 1989, which are more fully described below, Thomas L. Root owned between 15.6% and 44% of Nasby individually, having made gifts of stock to his minor children and transferred stock to Nasby's treasury. On June 23, 1989, Root transferred all of his shares in Nasby to his parents. Stip. at Pp. 3-4, Nasby Exhibit (hereinafter "PVN Ex.") 5. From before May 1983 until he resigned on March 21, 1990, Thomas L. Root was one of three directors of Nasby, and Nasby's corporate secretary. From before 1983 until he resigned on April 25, 1990, Root was general counsel and communications counsel of Nasby. Stip. at p. 1.

5. From prior to 1983 until his resignation on October 31, 1988, David L. Williamson was general manager of Nasby's station, WSWR(FM). Also, from before 1983 Williamson was one of three Nasby directors,

Nasby's president and treasurer, and a shareholder. He resigned as director, president and treasurer on March 15, 1989. He relinquished his Nasby stock in May 1989. PVN Ex. 2, at p. 1.

6. Williamson testified that during his tenure as general manager he exercised complete control over all facets of day to day operations of WSWR, without input from the other two directors, Thomas L. Root and Emma Slone. He was solely responsible for employment policies and practices, although his own salary was determined by the board of directors. Similarly, Williamson stated that programming and commercial policies were established and implemented by him, without input from the other board members. He indicated that he made format decisions, including the decision to have programming delivered by the Satellite Music Network ("SMN"). However, prior to execution of the SMN contract Williamson asked Thomas L. Root, purportedly as the station's attorney, to review the contract which he had negotiated. Williamson negotiated for financing, but the board, including Thomas L. Root, determined when financing was needed and ratified Williamson's actions in obtaining financing. Both Williamson and Thomas L. Root signed the loan documents and provided personal guarantees. In August 1988, when the station was experiencing financial problems which included the threat of action by the Internal Revenue Service, Williamson informed Thomas L. Root. Root advanced Nasby the \$40,000 needed to satisfy the Internal Revenue Service. Although Williamson established and executed Nasby's business policies and practices, he contacted Thomas L. Root for guidance, purportedly in his role as general counsel. PVN Ex. 2, at Pp. 3-6.

7. When Williamson first became involved with Nasby, he spoke regularly with Thomas L. Root and Emma Slone. Thomas L. Root reviewed contracts and initial station financing. After the station became operational, Williamson spoke with Root and/or Slone no more than once a month. According to Williamson, he consulted with Root in his role as FCC counsel. From time to time he discussed corporate matters with Root, such as when he needed to sign stock certificates. PVN Ex. 2, at Pp. 7-8. Root maintained Nasby's corporate records, handled Nasby stock transactions and executed loan documents. PVN Ex. 1, at p. 5; PVN Ex. 2, at p. 8.

8. Timothy J. Moore succeeded Williamson as general manager of WSWR, as a director of Nasby and as its president and treasurer. Moore and his wife are custodians of Nasby stock for the benefit of Katharine C.R. Moore, a minor, and Moore holds an option to acquire 50 shares of Nasby stock. Like Williamson, Moore testified that he has exercised complete control over day to day operations of WSWR, including establishment and implementation of employment policies and practices, and programming and commercial policies. In November 1988, Moore assisted Thomas L. Root in negotiations for loan refinancing with a local bank. Only Root signed the loan documents and only Root was required to provide a personal guarantee. Moore testified that he has been solely responsible for subsequent loan financing, including a refinancing undertaken in July 1992 for which only Moore provided a personal guarantee. PVN Ex. 1, at Pp. 1, 3-5.

9. Corporate and FCC matters were routinely handled by Thomas L. Root. Root typically took care of the filing of the station's ownership reports. Root prepared the station's first renewal application, which he filed on June 1, 1989. In May 1990, after Root had officially resigned all his positions with Nasby, including that of general counsel, Moore received a letter from the Commission rescinding WSWR's license renewal. Moore contacted Root, who professed no idea as to the reason for the letter. At that time, Root reminded Moore of the need to file an annual ownership report in June 1990. Root assisted in the preparation of that ownership report. PVN Ex. 1, at Pp. 6-8; Tr. 59, 61, 66-67.

10. From before 1983 until November 1988, when David Williamson resigned as general manager of WSWR, Williamson had complete and sole access to the station's checking accounts. PVN Ex. 2, at p. 4. From November 25, 1988, until September 7, 1993, Thomas L. Root had bank signature authority with respect to the station's bank accounts, together with Williamson's successor, Timothy J. Moore. Moore testified that Root's name had inadvertently not been removed from bank signature cards following his resignation, a fact learned only during the discovery phase of the instant proceeding. According to Moore he, and only he, has prepared, caused to be prepared, and/or signed all station checks. Moore stated that, during Moore's tenure, Thomas L. Root has not signed any WSWR checks. Further, upon learning that Root's name remained on bank signature cards, Moore caused Root's name to be removed therefrom. PVN Ex. 1, at Pp. 4-5; Tr. 54, 66.

11. Meetings of shareholders and directors of Nasby have been held annually, in May, in Shelby, Ohio. The meetings were presided over by Williamson or Moore, as president of Nasby. Financial information was made available at shareholders meetings. At the board meetings which followed, the station's financial status was discussed, officers were elected, and the salary of the general manager, who was also the president, was determined. Thomas L. Root attended all of these meetings and voted. PVN Ex. 1, at Pp. 3, 5; PVN Ex. 2, at Pp. 6-7; Tr. 69, 84.

12. For a period of time prior to his resignation from positions with Nasby, Thomas L. Root represented, in licensing proceedings before the Commission, applicants for FM construction permits, some of which were formed by Sonrise Management Services, Inc. ("Sonrise"). On March 21, 1990, a 33 count federal indictment was returned against Root in the United States District Court for the District of Columbia. Root was disbarred from the practice of law in the District of Columbia on May 12, 1990. Root was indicted on four counts in the United States District Court for the Southern District of Illinois on June 21, 1990. The Illinois criminal action was consolidated with the action in the United States District Court for the District of Columbia on September 11, 1990. Stip. at Pp. 1-2; Mass Media Bureau Exhibit (hereinafter "MMB Ex.") 1, MMB Ex. 2.

13. Thomas L. Root entered into a plea agreement in the consolidated federal proceeding and was adjudged guilty on January 17, 1992, of two counts of altering, forging and counterfeiting public

records, three counts of wire fraud and one count of transport of stolen monies obtained by fraud. Root's misconduct, which occurred in the context of application licensing proceedings before the Commission, included, inter alia, the submission of a counterfeit Federal Aviation Administration "No Hazard" determination in a Commission licensing proceeding in 1988, and the forging, in January 1989, of a counterfeit order of an Administrative Law Judge of the Commission. The licensing proceedings did not involve Nasby. On January 17, 1992, as a result of his conviction in the consolidated federal proceeding, Root was sentenced to a term of 33 months in federal prison, where he is now serving his sentence. Stip. at p. 2; MMB Exs. 1, 2, 3.

14. On June 4, 1990, three indictments were returned against Thomas L. Root in Nash County of the State of North Carolina. On October 26, 1990, in North Carolina, Thomas L. Root pleaded no contest to 90 counts of selling an unregistered security, 90 counts of failing to register as a securities dealer, and 180 counts of securities fraud in violation of North Carolina statutes, and four counts of conspiracy. The misconduct in question took place as early as 1986. On August 28, 1992, the State of North Carolina entered a Judgment and Commitment for all counts to which Thomas L. Root pled no contest and Root was sentenced to 15 years in prison to be served concurrent with his federal sentence. Stip. at Pp. 2-3; MMB Exs. 4, 5, 6.

15. On August 13, 1990, an indictment was returned against, inter alia, Thomas L. Root in Pinellas County of the State of Florida.

On January 10, 1991, a superseding indictment was filed against Thomas L. Root in Pinellas County of the State of Florida.

On June 23, 1992, in Florida, Thomas L. Root pleaded no contest to charges of racketeering, conspiracy to commit racketeering, organized fraud, organized securities fraud, and sale of unregistered securities. The misconduct took place as early as 1986. On June 23, 1992, Thomas L. Root was adjudicated guilty of one count of racketeering, one count of conspiracy to commit racketeering, three counts of organized fraud, one count of organized securities fraud, 20 counts of sale of unregistered securities, and 20 counts of securities fraud. He was sentenced to 15 years in prison to be served concurrent and co-terminous with North Carolina charges and concurrent but not co-terminous with federal charges. Stip. at p. 3; MMB Exs. 7, 8, 9.

Unauthorized Transfer of Control Issue

16. As of May 29, 1989, Thomas L. Root, individually, owned 120.25 shares of Nasby stock, representing 24% of the total issued and outstanding stock of the corporation. He also held 50 shares as a custodian for his minor children, representing 10% of the total issued and outstanding stock of Nasby. Stip. at p. 3.

17. On May 30, 1989, Root acquired another 100 shares, and on May 31, 1989, he transferred the 50 shares held by him as a custodian to his minor children as gifts. Thus, as of May 31, 1989, Root owned 220.25 shares of Nasby stock as an individual. Stip. at Pp. 3-4.

18. On June 1, 1989, Thomas L. Root transferred 50 of his own shares to the corporation as treasury shares in return for the forgiveness of a corporate debt which he had assumed. Also on that date, Root transferred 100 Nasby shares to his minor children as gifts. Thus, Root was left with ownership of 70.25 shares, or 15.6% of the total Nasby shares issued and outstanding. On June 23, 1989, Root transferred that remaining stock to his parents. Stip. at p. 4.

19. On June 1, 1989, Root's wife, Kathy G. Root, transferred 25 shares of Nasby stock individually owned by her to her minor children as gifts. This left Mrs. Root with a balance of 33 Nasby shares owned individually, representing 7.3%, and 50 shares, or 11.1%, which she held as custodian for her minor children. Stip. at p. 4.

20. The foregoing ownership changes were first reported in an April 27, 1990, amendment to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989, renewal application. On October 19, 1992, Nasby filed FCC Form 315, a transfer of control application seeking nunc pro tunc approval of the foregoing transactions. Stip. at p. 4; MMB Ex. 11. On October 19, 1992, Nasby also filed a second FCC Form 315 seeking approval of the proposed transfer of 70.25 shares of Nasby stock from Thomas L. Root's parents to the law firm of Ginsburg, Feldman & Bress. The second application is contingent upon Commission grant of the first application for transfer of control. Ginsburg, Feldman & Bress were attorneys for Thomas L. Root, and the proposed transfer is in lieu of legal fees. Stip. at Pp. 4-5; MMB Ex. 12; Tr.

64, 65.

21. Thomas L. Root's wife, Kathy G. Root, testified that the foregoing transfers of stock to the Root children were designed to "even up" their stock ownership for estate planning purposes. Mrs. Root stated that she was not aware of, and did not focus on, the possibility that prior Commission approval might be needed in connection with the transfers. She never discussed the potential need for filing an application with her husband. Since Thomas L. Root was the station's attorney, Mrs. Root assumed that he would handle whatever paperwork was necessary to effectuate the transfers.

Conclusions of Law

22. The Commission has made clear that evidence of conviction of a felony will be relevant to its evaluation of a licensee's character and that a felony conviction raises the question of whether a licensee has the requisite propensity to obey the law. Furthermore, in particular cases the Commission will look upon the willfulness of the conduct, its frequency, currency and seriousness, as well as the nature of the participation of managers and owners, efforts to remedy the wrong, the licensee's record of FCC compliance and rehabilitation. 1990 Character Policy Statement, 5 FCC Rcd 3252 (1990). Applying those guidelines to the instant case, there is no doubt that Nasby lacks the character qualifications to remain a Commission licensee.

23. Before he transferred all of his shares in Nasby to his

parents, Thomas L. Root owned between 15.6% and 44% of Nasby individually. He was one of three directors and Nasby's corporate secretary. In 1992, Root was adjudged guilty of numerous felonies in federal court and in courts in North Carolina and Florida. Most of these felonies involved fraud, which occurred in the context of application licensing proceedings before the Commission. The federal proceeding involved the forging of an order of a Commission Administrative Law Judge, and the submission in a Commission proceeding of a counterfeit Federal Aviation Administration "No Hazard" determination. Thus, the misconduct was willful, frequent, current and serious. Moreover, it was directly related to the Commission's licensing activities.

24. In addition, it cannot be denied that the perpetrator of the conduct was, at the time of the conduct, in control of the largest single block of Nasby stock. The fact that Root resigned prior to his convictions is unavailing. TV 9, Inc. v. FCC, 495 F. 2d 929, 939-40 (D.C. Cir. 1973). Moreover, the misconduct clearly took place while Root was a Nasby principal. To conclude that an applicant should not be disqualified merely because its principal resigned just before being convicted would make a mockery of the Commission's character requirements.

25. Nasby insists that it should not be disqualified because Root was not an active participant in Nasby. Even if this were true, which it is not, the Commission has refused to insulate from its character requirements even persons whose ownership interests are not

attributable. Marr Broadcasting Company, Inc., 2 FCC Rcd 6596 (1987). Likewise, the Commission will not "atomize a licensee into its molecular elements for a gratuitous adjudication on the discrete qualifications . . . of individual shareholders." West Jersey Broadcasting, Co., 90 FCC 2d 363, 371 (Rev. Bd. 1982). For this reason, Nasby would lack the requisite character qualifications even if Root had exercised no de facto control and those who did control Nasby were totally innocent.

26. The fact is, however, that Thomas L. Root was not the passive owner that Nasby purports. Even when day-to-day operations of a station are delegated to an agent or employee, control can vest elsewhere. David A. Davila, 6 FCC Rcd 2897, 2899 (1991). Where such control rests must be determined on the basis of the facts peculiar to this case.

27. Here, for example, Thomas L. Root reviewed many matters ostensibly as the station's attorney. But Nasby cannot claim that Root's activities were somehow distinguishable from those of an owner merely because he was an attorney. In Lorain Journal Company v. FCC, 351 F. 2d 824 (D.C.Cir. 1965) who selected the attorney was deemed relevant. Here the owner was the attorney. Here, in addition, as in Lorain Journal, Root had the authority to sign checks and he kept the corporate books.

28. Here, Root reviewed a station contract for the provision of programming by the Satellite Music Network. Root was one of three

members of the Board, and the Board determined when financing was needed and what to pay the general manager. Evidence in the record suggests that Root attended and voted at all Board meetings. Root signed loan documents and provided personal guarantees and he once advanced Nasby \$40,000 to satisfy the Internal Revenue Service. Root handled the filing of ownership reports and prepared and filed the station's first renewal application. Even after he had resigned, Root assisted the station in filing an ownership report.

29. Thus, Root's involvement far exceeds that of the wrongdoer in Sande Broadcasting Co., Inc., 61 FCC 2d 305 (1976). Moreover, in Sande, at 309, the Commission relied upon the fact that the misconduct there did not involve broadcasting or any application before the Commission. Here, of course, the misconduct arose out of Root's representation of applicants before the Commission. Significantly, Root was convicted of forging an order of a Commission Administrative Law Judge and of submitting a counterfeit Federal Aviation Administration "No Hazard" determination to the Commission.

30. For the foregoing reasons, it is concluded that Nasby does not possess the character qualifications to remain a Commission licensee. Accordingly, its renewal application must be denied.

31. It is further concluded that, even if Nasby were not disqualified for failing to possess the requisite character qualifications based on Root's convictions, Nasby would have to be disqualified for effecting an unauthorized transfer of control. Nasby

concedes that stock transactions which took place in May and June 1989 had the cumulative effect of transferring control of Nasby. Although Section 310(d) of the Communications Act of 1934, as amended, prohibits the transfer of control of any corporation except upon grant of an application therefor by the Commission, prior Commission approval was not sought for these transactions.


32. Nasby claims that the failure to file an application for transfer of control was inadvertent. This argument is belied by the fact that its principal, Thomas L. Root, was a communications lawyer and served as counsel for Nasby. Moreover, the ownership changes which took place were not reported to the Commission via an ownership report until nearly a year had elapsed. Rather, the totality of the evidence strongly suggests intentional deception, and a motive can be easily inferred from Thomas L. Root's legal difficulties. For this reason, disqualification is the only reasonable sanction here. Compare Silver Star Communications - Albany, Inc., 6 FCC Rcd 6905 (1991).

33. In sum, as a result of the felony convictions of Thomas L. Root, Nasby lacks the character qualifications to remain a Commission licensee. Even if this were not the case, Nasby would not be found basically qualified because it engaged in an unauthorized transfer of control in violation of Section 310(d) of the Communications Act of 1934, as amended. Accordingly, Nasby's pending renewal application

should be denied and the pending applications for consent to the transfer of control of Nasby should be dismissed as moot. Finally, in view of the proposed denial of renewal no forfeiture should be imposed.

Respectfully submitted,
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March 4, 1994

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has, on this 4th day of March, 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law"** to:

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